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Supreme Court, U.S.
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No. 99-1549

IN THE

Supreme Court of the United States

MRO COMMUNICATIONS, INC.,
A NEVADA CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that AT&T Corp.'s ("AT&T") billing and collection services were not subject to regulation under the Federal Communications Act, where the Federal Communications Commission has so held and where billing and services are not set forth in the applicable filed tariff?

STATEMENT REQUIRED BY RULE 29.6

AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
THE DECISIONS BELOW	3
REASONS FOR DENYING THE PETITION	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 118 S.Ct. 1956 (1998)	3
In re Audio Communications, Inc., 8 F.C.C.R. 8697 (1993)	6,9,10
In the Matter of AT&T Dial-It 900 Servs. and Third-Party Billing and Collection Servs. ("Dial-It"), 4 F.C.C.R. 3429 (1989)	5,6,7,9,10
Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 112 S.Ct. 2759 (1990)	4,7,8,9
McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F.2d 720 (9th Cir.), *cert. denied*, 444 U.S. 839 (1979)	10
National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422 (D.C. Cir. 1989)	10
Pan Am Petroleum Corp. v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303 (1990)	9
In re Paul Ondulich, 5 F.C.C.R. 3190 (1990)	6
People of the State of Cal. v. FCC, 905 F.2d 1217 (9th Cir. 1990)	10
STATUTES AND RULES	
Ninth Circuit Local Rule 36-3	4,10

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STATEMENT OF THE CASE

The Ninth Circuit properly held in an unpublished opinion that the billing and collection services (including the call detail data records associated with those services) offered by AT&T for 900 number programs pursuant to contract are not subject to regulation under the Federal Communications Act, as the Federal Communications Commission ("FCC") repeatedly has held. This case does not involve any split among the circuits, any issues of national concern, or any conflict with the well-settled law regarding the filed tariff doctrine articu-

lated by this Court. Rather, the petition asks this Court to engage in simple error correction (which, in any event, is unwarranted) and therefore does not present an issue worthy of this Court's review.

In May 1989, Petitioner MRO Communications, Inc. ("MRO") began purchasing transport services for MRO's 900 number programs from AT&T. AT&T offered transport services to MRO pursuant to a tariff filed with the FCC, AT&T Tariff No. 1 (the "Tariff"). AT&T's transport services involve AT&T's supply of telephone lines over which voice and data are conveyed. (*See* Pet. App. at 22a.) Separately, MRO executed a non-tariffed Billing Services Agreement ("BSA") with AT&T in May 1989, whereby AT&T would bill and collect charges from the callers to MRO's 900 programs. AT&T then would remit the charges to MRO, less certain costs and a 10 percent fee based on the total charges billed to callers who called MRO's 900 number programs. (*See id.*) While provision of transport services is offered pursuant to a tariff and regulated by the FCC, the provision of billing services is offered pursuant to a contract and not regulated. (*See id.* at 22a-23a.)

In November 1992, MRO filed for bankruptcy protection, and in July 1993, MRO filed a lawsuit against AT&T arising out of the BSA and certain alleged violations of the Bankruptcy Code. In October 1995, AT&T terminated the BSA. MRO thereafter utilized billing and collection services from a different provider, International Telemedia Associates, Inc. ("ITA"), pursuant to a new contract that MRO executed with ITA. MRO continued to utilize AT&T's transport services for its 900 number programs. Separately, ITA had an agreement with AT&T pursuant to which AT&T provided ITA with certain call detail data used for the calculation and collection of billing charges to ITA's 900 number customers, such as MRO. (*See id.* at 23a.)

THE DECISIONS BELOW

On February 6, 1998, AT&T commenced this collection action based upon MRO's failure to pay more than $188,000 in monthly telephone bills for 900 call tariffed transport services that AT&T provided to MRO from January 1996 through February 1998. (*Id.* at 2a-3a.) MRO denied any liability in its answer and asserted a number of affirmative defenses and counterclaims. (*Id.* at 8a, 10a.)

AT&T moved for summary judgment on its collection claim based on the filed tariff doctrine and to dismiss MRO's counterclaims. In opposing AT&T's motion, MRO contended that AT&T was not entitled to collect its tariffed charges because of past errors relating to non-tariffed billing and collection services, and because AT&T had not provided certain call detail records within a reasonable time to MRO, as AT&T purportedly was required to do under the Tariff, between July 1997 and early October 1997. On November 3, 1998, the district court issued a well-reasoned thirty-two page opinion granting AT&T's motion for summary judgment and dismissing MRO's counterclaims. (*Id.* at 20a-54a.) MRO appealed.

On December 13, 1999, in an unpublished memorandum, the Ninth Circuit affirmed the district court's ruling. (*Id.* at 1a-19a.) The Ninth Circuit properly held that, under this Court's most recent pronouncement regarding the filed tariff doctrine, " 'the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.' " (*Id.* at 5a (quoting *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 1962 (1998)).) The Ninth Circuit found that AT&T's evidence of the tariffed transport charges incurred by MRO was sufficient to warrant summary judgment. (Pet. App. at 3a-8a.)

The Ninth Circuit also rejected MRO's contention, in both its third affirmative defense and a number of its repetitive counterclaims, that AT&T's alleged failure to provide call detail records violated the terms of the Tariff and the Federal Communications Act. The Ninth Circuit reviewed the Tariff provisions that, according to MRO, required AT&T to provide call detail records to MRO, as well as the provisions of the Federal Communications Act upon which MRO relied. The Ninth Circuit correctly observed that under "the filed rate doctrine, '[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.' " (*Id.* at 9a (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S.Ct. 2759, 2766 (1990) (brackets in original)).) The Ninth Circuit squarely rejected MRO's arguments, holding that "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions or the statute to which MRO pointed." (Pet. App. at 9a.)

REASONS FOR DENYING THE PETITION

1. MRO contends that the Ninth Circuit failed to consider MRO's arguments below regarding a particular FCC decision, the applicability of the Federal Communications Act, and the Tariff. (Pet. at 3-6.) Those contentions are baseless and in any event do not raise any matter worthy of this Court's review. MRO points to no circuit split concerning the interpretation of the Tariff or the particular FCC decision upon which MRO relies. MRO does not suggest that the Ninth Circuit's unpublished decision established any groundbreaking rule of law regarding the filed tariff doctrine or any other binding precedent.[1]

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[1] Pursuant to the Ninth Circuit's Local Rule 36-3, unpublished decisions like this one "shall not be regarded as precedent and shall not be cited . . . except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel." Ninth Circuit Local Rule 36-3.

MRO misstates the record below and misconstrues the holdings of the Ninth Circuit as well as the FCC decision cited in its petition. Contrary to MRO's assertion (Pet. at 5-6), the Ninth Circuit did, in fact, consider MRO's arguments. Indeed, the Ninth Circuit specified that it had considered the matters raised in MRO's briefs, and that it had reviewed the Tariff and statutory provisions upon which MRO relies. (*See* Pet. App. at 8a-9a.)

Further, MRO misconstrues the FCC decision upon which it places great emphasis, *In the Matter of AT&T Dial-It 900 Servs. and Third-Party Billing and Collection Servs.* ("*Dial-It*"), 4 F.C.C.R. 3429 (1989). (Pet. at 3.) In *Dial-It*, the FCC was also clear in its rejection of the argument that MRO now advances. The FCC contrasted two kinds of services offered by AT&T: (1) transport service that AT&T provides to all subscribers of its services, who are billed and charged rates in accordance with the terms set forth in the filed Tariff, and (2) non-tariffed premium billing and collection services, pursuant to which AT&T billed and collected premium charges (set by subscribers) from callers to the subscribers' 900 number programs. The terms and conditions of AT&T's premium billing and charges were set forth in its contract with MRO—the BSA—*not* in the Tariff. Because competition in the billing and collection services was a "developing reality," particularly given the influx of "credit card companies, among others" that were entering the billing and collection market, the FCC concluded that "tariff regulation was unnecessary" to control billing and collection providers. *Dial-It*, 4 F.C.C.R. at 3433-34. The FCC squarely held that AT&T's 900 number billing service "is not a Title II common carrier service [under the Federal Communications Act], is subject to current and foreseeable competition and, as a result, is properly offered by AT&T on a non-tariffed basis." *Id.* at 3434.[2]

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[2] MRO takes out of context one statement in *Dial-It* where the FCC was summarizing an argument AT&T had made before the FCC, in

Since its *Dial-It* decision the FCC has refused every invitation to regulate billing and collection services, finding time and again that there was no merit to the argument that billing services (which include providing the call detail information that MRO has put at issue) must be regulated. *See, e.g., In re Paul Ondulich*, 5 F.C.C.R. 3190, 3190 (1990) (dismissing complaint alleging violation of the Federal Communications Act based on the supposed "bundling" of billing and transport services because third party billing services were not communications services offered pursuant to tariff); *In re Audio Communications, Inc.*, 8 F.C.C.R. 8697, 8697 (1993) (holding Sprint Telemedia's 900 billing and collection service was not governed by the Federal Communications Act.).[3]

MRO persists in confusing and conflating two distinct services—tariffed transport services on the one hand, and non-

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which AT&T noted that it did not obtain call detail data directly, but rather from local telephone companies (referred to as "local exchange carriers" or "LECs".) (Pet. at 3; *Dial-It*, 4 F.C.C.R. at 3432.) AT&T had noted that because there was not yet competition in billing services, the FCC required LECs to make call detail information available on a reasonable basis. Indeed, in the very next line of the FCC's *Dial It* decision after the line quoted by MRO (Pet. at 3), the FCC stated that "AT&T argues that the fact of competition for billing of IXC services in general indicates the presence of market forces sufficient to respond to excessive rates or practices by 900 service billing and collection providers." *Dial-It*, 4 F.C.C.R. at 3432. For that reason, the FCC did not find a need for regulation of billing services provided by carriers like AT&T. In any event, whether the FCC determined that LECs were required to provide billing information to carriers and third party billers is an issue entirely separate and distinct from whether the FCC subsequently imposed any obligation on carriers or other third party billers to give that same information to their subscribers.

[3] MRO also inappropriately relies on the FCC's discussion of AT&T's "Call Count" feature in the *Dial-It* decision (Pet. at 6-7). The FCC's discussion of billing and collection issues is an entirely separate and discrete section of the *Dial-It* decision, in which the FCC unequivocally held that billing and collection services should not be tariffed services. *See Dial-It*, 4 F.C.C.R. at 3431.

tariffed billing services on the other—that the FCC repeatedly has determined do not constitute one service. MRO does not complain that AT&T failed to provide it with call detail sufficient under the Tariff for transport services. Rather, MRO's petition centers on AT&T's purported failure to provide call detail records in connection with the billing services it separately contracted for and which were not tariffed. The FCC has refused to assume any regulatory authority over the billing services because there was and is available competition—any information provider dissatisfied with AT&T's services is free to subscribe to alternative billing providers, including credit card companies and other carriers. *Dial-It*, 4 F.C.C.R. at 3433-34. In fact, that is precisely what MRO did in this case. (*See* Pet. App. at 23a.)[4] The Ninth Circuit properly deferred to the FCC's rulings that billing services should not be regulated, and that decision does not warrant further review by this Court.

2. MRO also wrongly contends that the Ninth Circuit did not follow this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 112 S.Ct. 2759 (1990), which held that a plaintiff is entitled to recover for damages relating to a defendant's failure to comply with the terms of the defendant's tariff. (Pet. at 8-9.) MRO does not contend that the Ninth Circuit disregarded the holding of *Maislin*, or announced some new law contrary to *Maislin*. Rather, MRO asserts, incorrectly, that the Ninth Circuit erred in applying *Maislin* in its unpublished memorandum. (Pet. at 8-9.)

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[4] MRO also argues that if billing services remained unregulated, then AT&T could "refuse to contract" with its customers to provide them with the call detail necessary to bill customers. (Pet. at 5.) That is a possibility —however unlikely—that is controlled by the market. If AT&T provided no call detail needed by its customers, it would lose them to the many competitors in the third party billing market. That is precisely why the FCC decided there was no need to regulate billing services. *See Dial-It*, 4 F.C.C.R. at 3433-34.

The Ninth Circuit was entirely correct in concluding that "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions or the statute to which MRO pointed." (Pet. App. at 9a.) MRO relies on § 5.4.4 of the tariff, which it neglects to inform the Court, it did not raise in the district court. Indeed, MRO brought that Tariff provision to the Ninth Circuit's attention only in a letter submission after the parties had completed all briefing in the Ninth Circuit and the record had been filed. (*See id.*)

In any case, the Ninth Court considered and correctly rejected MRO's assertion that § 5.4.4 requires AT&T to provide call detail to MRO. (*Id.*) First, § 5.4.4 is an "optional feature" provided by AT&T for an additional tariff charge to which MRO did not subscribe and for which it was not charged.[5] Moreover, MRO had entered into a separate billing services contract with ITA, a third party biller, to obtain the call detail information at issue. (*Id.* at 23a)

Second, § 5.4.4 merely states that as part of AT&T's transmission of the call, AT&T would provide the "calling party number" or "billing number" in real time, a service akin to "caller ID." The plain language of § 5.4.4 does not state that AT&T would provide the kind of call record detail used with billing services, such as the duration of the call, the number of calls to a particular 900 program such as MRO's, or the

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[5] Tariff § 5.4.4.A provides in part that "The following conditions apply:

Info-2 is only available when Customer access to AT&T MultiQuest Service utilizes the Primary Rate Interface ("PRI") office function. The PRI is provided in AT&T Tariff F.C.C. No. 9.

Per caller number information delivered, Usage Charge $.01."

MRO never suggested in any of its submissions below that it could qualify for "Info-2" service, that it in fact subscribed to it, or that it paid for it – all of which MRO would have had to do as a matter of law under the filed tariff doctrine. *See Maislin*, 497 U.S. at 127, 110 S.Ct. at 2766.

or the frequency of calls made by the same caller. Accordingly, the Ninth Circuit properly applied well-established filed-tariff jurisprudence to reject MRO's arguments. *See Maislin*, 497 U.S. at 126, 110 S.Ct. at 2766 ("[t]he rights as defined by the tariff cannot be varied or enlarged..."); *Pan Am Petroleum Corp. v. Superior Court*, 366 U.S. 656, 666, 81 S.Ct. 1303, 1309 (1990) (same).

3. MRO next contends that the Ninth Circuit improperly held that billing services (including the provision of call detail records) by interexchange carriers like AT&T are not regulated, because the absence of Federal regulation would permit AT&T to simply refuse to provide billing services to certain customers, purportedly giving AT&T "monopoly leveraging" position in violation of §§ 201 and 202 of the Federal Communications Act. (Pet. at 10-11.) That contention is baseless. The FCC specifically found that there was a highly competitive market for billing services, and therefore there was no reason to subject billing services to the Federal Communications Act. *See Dial-It*, 4 F.C.C.R. at 3433-34 ("tariff regulation was unnecessary to control anticompetitive behavior" of carriers providing billing services because of the existence of a "competitive market" that included "credit card companies, among others," providing those services); *Audio Communications*, 8 F.C.C.R. at 8700 ("[T]he billing and collection services provided by IXCs [interexchange carriers like Sprint, MCI and AT&T] for IPs [information providers] is subject to even more competition than the billing and collection services provided by LECs in the *Detariffing Order* and by AT&T in the *AT&T Dial It Order* and thus there is even less reason to treat it as common carriage."). Further, nothing in the record below even remotely supports MRO's assertion that AT&T did or could engage in "monopoly leveraging." (Pet. at 10.) The FCC findings refute MRO's contention.

4. Finally, MRO contends that the issue of whether call detail records are provided "for or in connection with" com-

munications services under the Federal Communications Act is a matter of "national importance" because of an "overriding need for national Uniformity." (*Id.* at 11.) MRO nowhere explains why this issue, which the FCC has determined should be subject to the variety of the marketplace, requires uniformity. *See, e.g., Dial-It*, 4 F.C.C.R. at 3433-34; *Audio Communications*, 8 F.C.C.R. at 8700. Nor does it explain how there is any discrepancy in the existing law. MRO has not cited to any split or conflicting authority on whether billing services (including call detail) should be subject to the Federal Communications Act.[6] The Ninth Circuit did not view this to be an issue of significance, determining that it could be resolved by an unpublished opinion. *See* Ninth Circuit Local Rule 36-3. This Court should view this petition in the same light.

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[6] MRO cites several decisions purporting to require "uniformity" in the telecommunications industry (Pet. at 11), but not one of them supports its argument. *See, e.g., McDonnell Douglas Corp. v. General Tel. Co. of Cal.*, 594 F.2d 720 (9th Cir.), *cert. denied*, 444 U.S. 839 (1979) (refusing to find that billing practices of intrastate telephone service should be subject to anti-discrimination provision (§ 202) of Federal Communications Act); *People of the State of Cal. v. FCC*, 905 F.2d 1217, 1238-45 (9th Cir. 1990) (overturning FCC order pre-empting state law regulations); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (refusing to impose national standards sought by FCC).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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